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BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 676

Full Disclosure of Railroad Contracts

COMMENTS OF

PPG INDUSTRIES, INC.

PPG Industries, Inc. ("PPG") appreciates the opportunity to submit comments in this "Notice of Proposed Rulemaking" proceeding, in which the Surface Transportation Board ("STB" or "Board") is proposing to require rail carriers to include a full disclosure statement in railroad transportation contracts entered into between shippers and carriers pursuant to 49 U.S.C § 10709.

Background of the STB's Proposal

This proceeding is intended to address the Board's concern over "the lack of any clear demarcation between common carriage rates and contract pricing arrangements and the resulting ambiguity regarding the Board's jurisdiction." STB Notice, served March 12, 2008, slip op. at 4. Originally, the STB raised this issue in another rulemaking proceeding, Ex Parte No. 669, *Interpretation of the Term Contract in 49 U.S.C. 10709*, in which the Board proposed to interpret the term "contract" as:

> any bilateral agreement between a carrier and a shipper for rail transportation in which the railroad agrees to a specific rate for a specific period of time in exchange for consideration from the

shipper, such as a commitment to tender a specific amount of freight during a specific period or to make specific investments in rail facilities.

However, the Board decided not to adopt the proposed rule and to discontinue that proceeding after shippers and the railroads both opposed the contract definition.

In the instant proceeding, the Board has taken a different approach. The Board is now *proposing to require railroads that seek to enter into a rail transportation contract to expressly* disclose to the shipper in a full disclosure statement that: (1) the document offered by the carrier is a contract and that transportation performed under the contract is not subject to the Board's jurisdiction; and (2) the shipper has the right to request a common carrier rate that may be challenged before the Board. The Board is further proposing to require railroads to provide to shippers, in advance of entering into a contract, the opportunity to sign a written informed consent that demonstrates the shipper's understanding that it is giving up its regulatory options by entering into the contract.

PPG opposes the Board's proposal. We believe that the proposal will further reduce shippers' regulatory options by encouraging the railroads to transform their rate offerings into contracts, simply by issuing the full disclosure statement. The railroads could effectively create contracts with their customers even though there is no bilateral negotiation or "meeting of the minds" between the parties.

Interest of PPG

PPG is a diversified manufacturer of chemicals, protective coatings, glass and fiber glass with over 22,000 employees in the United States and more than 50 major facilities in 23 states. Total sales in 2007 were $11.2 billion. It is expected that in 2008 almost half these sales will be in the U.S. PPG operates in more than 60 countries around the globe.

PPG's commodity chemicals segment produces chlor-alkali and derivatives including chlorine, caustic soda, vinyl chloride monomer, chlorinated solvents, chlorinated benzenes, calcium hypochlorite, and other chemicals. Most of these products are sold directly to manufacturing companies in the chemical processing, plastics and rubber, paper, minerals, metals, and water treatment industries. Price, availability, product quality and customer service are the key competitive factors in these businesses. Therefore, efficient, affordable rail transportation is crucial. PPG's North American chlor-alkali chemicals business operates three production facilities and employed over 2000 persons in 2007. Cost pressures have made it exceedingly difficult for PPG's businesses, including commodity chemicals to compete in a global market and to maintain jobs in the United States. The commodity chemicals sector of our business has faced tremendous cost pressures, where we have seen the rail cost to ship chlorine skyrocket more than 80% since 2004. Another example of skyrocketing costs can be evidenced with the cost of natural gas. The chlor-alkali industry estimates that every $1.00/mmbtu change in natural gas price impacts costs by $25.00 to $30.00 per ECU (1 ton of chlorine and 1.1 tons of liquid caustic soda). Also on the rise is the cost of labor and materials in the Gulf Coast. All of these are impacting the competitive position of PPG's business.

PPG is one of the nation's largest manufacturers of chlorine, a toxic inhalation hazard. Despite chlorine's hazardous characteristics, it is crucial to society. Chlorine is most known for its use in water purification, but this accounts for only approximately 6% of its consumption. Chlorine's importance to society is immense. It is an essential chemical building block in manufactured products to the automotive, construction, defense, electronics, food processing, health care, medical, metals, and outdoor recreation industries. The list of products derived from chlorine chemistry accounts for approximately 45% of the nation's GDP. Chlorine also is deemed an essential asset by the Department of Homeland Security as critical infrastructure.

PPG Supports a Strong and Competitive Rail Transportation Industry

Many of PPG's businesses are dependent upon reliable rail service. We believe an efficient, reliable and successful rail industry is absolutely essential to a healthy and competitive U.S. economy and critical to PPG's success.

PPG requires efficient rail transportation, as some of our products cannot be moved by other modes and many of PPG's customers cannot receive our products via alternative modes. In North America, PPG only uses rail to ship its chlorine over land. In that regard, PPG ships chlorine approximately 25% to 30% by rail and ships the remainder of the chlorine through pipelines or barges.

PPG's Experiences With the Railroad's Pricing Policies:

In the past 5 years the railroads have changed their approach to the negotiation of rates with PPG. The rates offered to PPG and implemented by the railroads substantially favor the carriers while largely ignoring the pricing needs of PPG. We believe that railroads have been successful in extracting significant price increases from PPG based upon the limited competition in the rail industry. With mergers and consolidations, 90% of the freight hauled in the U.S. is handled by only 4 railroads.

In the past, PPG could negotiate long-term rail contracts covering multiple years, with reasonable price increases mutually negotiated between the parties. Today, virtually all of our contract rates for shipping chemicals expire after one year, and some rates remain in effect for only six months. Moreover, the railroads have gradually shifted PPG's service and pricing terms for some commodities from contracts to private circulars and tariffs. The circulars and tariffs allow the railroads to change (i.e. increase) our pricing at any time on 20 to 30 days notice. We have been told that the railroads require this pricing flexibility to address the potential for "forced" *routing changes necessitating the railroads to haul TIH (toxic by inhalation) materials* around certain unspecified prohibited areas, and to address potential new regulations or rules that create cost increases or inefficiencies for the railroads.

The impact of the railroads' pricing practices on PPG's business is that PPG's transportation costs for TIH materials in both contract and non-contract pricing authorities can dramatically change (i.e. increase) on only 20 - 30 days notice, based on a unilateral determination by the railroad. As for contract pricing, PPG has found that the railroads are less inclined to offer contracts on TIH materials and when contracts are offered, it is on a "take it or leave it" basis, without agreeable pricing that has been negotiated.

PPG owns or leases all of its tank cars for shipments of chemicals. The railroads use to offer a full mileage rate, where they paid the car owner a per mileage income as an incentive for purchasing its own cars to use on its tracks. Virtually all full mileage pricing for the commodities PPG ships has been eliminated. Often these conversions from full to zero mileage are also accompanied by a sizable increase in the base freight rate. Due to no or limited competition, PPG has been forced to accept these unfavorable terms.

The railroads have also extracted additional significant revenue from shippers such as PPG in the form of fuel surcharges. Initially, these surcharges were collected based on a percentage of the base rate. This meant that shippers had to pay a higher fuel surcharge for some chemical shipments such as chlorine, even though they were traveling the same distance as other chemicals. The STB eventually ruled that fuel surcharges that are based on a percentage of a freight rate are unreasonable and required the railroads to change their policy.

In summary, over the past 5 years, freight costs for all chemicals have increased significantly. PPG's cost to ship chlorine by rail has skyrocketed, more than 80% from 2004 to 2007, and we are experiencing a continuation of this trend in 2008. PPG has limited ability to control these costs because railroads often refuse to negotiate contract terms, but rather only offer us terms in private circulars and tariffs that allow for pricing changes with minimal notice.

PPG's Concerns with the Proposed STB Rule

PPG strongly opposes the proposed rule that would require a rail carrier to provide a full disclosure statement to its customer when it seeks to enter a rail transportation contract under section 49 U.S.C. 10709 for the following reasons:

- The railroads are well aware that private contracts are not subject to challenges before the STB. The proposal provides an additional incentive for railroads to convert rates into private contracts simply by issuing a disclosure statement, as opposed to entering into reasonable good-faith price and service negotiations with its customers.
- With private contracts, railroads can establish fuel surcharges that are based on unreasonable percentages of base rates, knowing that they cannot be challenged by the STB.
- While private contracts imply that the pricing and services have been subject to a bi-lateral negotiation between the shipper and carrier to the agreement, many railroads refuse to negotiate chlorine prices. The proposed disclosure statement would permit a rail carrier to create a contract without engaging in any negotiation with the shipper.

- While shippers can request common carriage rates, railroads will simply price these rates at even higher levels than their "contract" prices, especially for captive business which often requires the shipper to tender traffic under the "contract" and forgo their regulatory options. The shipper effectively is left with no choice since paying the even higher common carrier prices will only increase the adverse impact on its business.

PPG strongly believes that the Board's full disclosure proposal will only further encourage the railroads to apply a "take it or leave it approach" in the so-called contract negotiation process. We firmly believe that a shipper must have the ability to challenge a rate with the STB if it believes that no other means of negotiation is possible. However, the instant proposal will allow railroads to transform tariffs into contracts simply by issuing the full disclosure statement, even though the railroads may refuse to "negotiate" any of the terms of the contract. At the very least, shippers should have the authority to enter into such contracts under protest, whenever there is an effective lack of competition. In those cases, PPG believes that shippers should be permitted to seek a determination as to whether the rate charged is actually a tariff rate, and to challenge the "phantom contract rate" before the STB. PPG believes that a contract must be negotiated and the pricing, and terms and conditions, should be mutually agreeable to both parties Additionally, a railroad should not be permitted to unilaterally impose a contract on its customer based on of a lack of competitive options.

Conclusion

PPG commends the Board for raising the contract vs. tariff issues in this proceeding. However, for the foregoing reasons, PPG requests that the Board not adopt its proposal to require railroads to issue a full disclosure statement when it seeks to enter into a rail contract.

Respectfully submitted,

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